Supreme Court, U. S.
FILED
JUL 21 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1832

ERNEST F. MITCHELL, JR. AND
ROSE L. MITCHELL,
PETITIONERS,

v.

FORD MOTOR COMPANY, A Corporation,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION FOR CERTIFICATION TO THE NEW HAMPSHIRE SUPREME COURT

EUGENE M. VAN LOAN, III, ESQUIRE
95 Market Street
Manchester, New Hampshire 03101
Counsel for Respondent

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Refusing the Writ of Certiorari and for Denying the Motion for Certification	3
I. The Petition For Writ of Certiorari Should Be Denied Because the Issues Now Argued by the Plaintiffs Were Not Raised or Decided Below and No Substantial Federal Question Is Therefore Adequately Presented For Review.	3
II. The Petition For Writ of Certiorari and the Motion For Certification Should Be Denied Because the Law Actually Applied by the Court of Appeals in This Case Is the Same as the Law of the State of New Hampshire and No Substantial Federal Question Is Presented For Review.	7
III. Even if the Court of Appeals Did Apply a Federal Standard of Sufficiency of the Evidence and Even if That Standard Was Different From That Applied by the State Courts of New Hampshire, the Petition For Writ of Certiorari Should Be Denied Because the Predominant Federal Interest in the Uniformity of Its Jury Trial Procedure Dictates the Application of the Federal Standard.	12
Conclusion	15
Appendix A	16
Appendix B	21
Appendix C	36
Appendix D	39
Appendix E	41
Appendix F	44

Table of Citations

Cases

Page

Bellotte v. *Zayre Corporation*, 531 F.2d 1100 (1st Cir. 1976) 11
Bilodeau v. *Oliver Stores*, 115 N.H. — A.2d — (February 27, 1976) 11
Boothby v. *Prescott*, 97 N.H. 504, 92 A.2d 661 (1952) 7
Byrd v. *Blue Ridge Electric Co-op.*, 356 U.S. 525, 78 S.Ct. 893, 2 L. Ed. 2d 953 (1958) 13
Carlson v. *American Safety Equipment Corporation*, 528 F.2d 384 (1st Cir. 1976) 8
Cross v. *M. C. Carlisle & Co.*, 368 F.2d 947 (1st Cir. 1966) 6, 8
Dick v. *New York Life Insurance Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L. Ed. 2d 935 (1959) 13
Dubreuil v. *Dubreuil*, 107 N.H. 519, 229 A.2d 338 (1967) 7
Dumas v. *MacLean*, 404 F.2d 1062 (1st Cir. 1968) 5, 8
Ellis v. *Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L. Ed. 1231 (1955) 6
Hadler v. *Great Eastern Life Insurance Co.*, 109 N.H. 453, 256 A.2d 650 (1969) 7
Helvering v. *Minnesota Tea Company*, 296 U.S. 378, 56 S.Ct. 269, 80 L. Ed. 284 (1935) 6
Herron v. *Southern Pacific Co.*, 283 U.S. 91, 51 S. Ct. 383, 75 L. Ed. 857 (1931) 13
Hobart v. *O'Brien*, 243 F.2d 735 (1st Cir.), *cert. den.*, 355 U.S. 830 (1957) 5
McAllister v. *United States*, 348 U.S. 19, 85 S.Ct. 6, 99 L. Ed. 20 (1954) 11
McCullough v. *Kammer Corporation*, 323 U.S. 327, 65 S.Ct. 297, 89 L. Ed. 273 (1945) 6
McLaughlin v. *Sears, Roebuck & Co.*, 111 N.H. 265, 281 A.2d 587 (1971) 4, 9

Page

Mercier v. *Theriot*, 377 U.S. 152, 84 S.Ct. 1157, 12 L. Ed. 206 (1964) 13
Molinar v. *Western Electric Company*, 525 F.2d 521 (1st Cir. 1975), *cert. den.*, 96 S.Ct. 1485 (1976) 8
Moore v. *Phoenix Fire Insurance Co.*, 64 N.H. 140, 6 Atl. 27 (1886) 7
Murray v. *Bullard Co.*, 110 N.H. 220, 265 A.2d 309 (1970) 4, 9
Palmer v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 645 (1943) 13
Rescue Army v. *Municipal Court of the City of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409, 91 L. Ed. 1666 (1947) 6
Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614, 99 L. Ed. 897 (1955) 11
Safeway Stores v. *Fannan*, 308 F.2d 94 (9th Cir. 1962) 13
Service Auto Supply Co. of Puerto Rico v. *Harte & Company, Inc.*, 533 F.2d 23 (1st Cir. 1976) 7
Simler v. *Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L. Ed. 2d 691 (1963) 14
Wilson v. *Nooter Corporation*, 475 F.2d 497 (1st Cir. 1973), *cert. den.*, 414 U.S. 865 (1973) 6, 7
Wratchford v. *S. J. Grove & Sons*, 405 F.2d 1061 (5th Cir. 1969) 13, 15
Wright v. *Connecticut Valley Electric Co.*, 106 N.H. 113, 206 A.2d 103 (1964) 7

Constitutional Provisions

Seventh Amendment 5
Fourteenth Amendment 5

Statutes

New Hampshire RSA 507:7a 9, 10

Miscellaneous

Page

5 MOORE'S FEDERAL PRACTICE §38.10 (1967) 13

Wright, HANDBOOK ON THE LAW OF FEDERAL COURTS §92 (2d ed. 1970) 14

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1832

ERNEST F. MITCHELL, JR. AND
ROSE L. MITCHELL,
PETITIONERS,

v.

FORD MOTOR COMPANY, A Corporation,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION FOR CERTIFICATION TO THE NEW HAMPSHIRE SUPREME COURT

Statement of the Case

Plaintiff Ernest Mitchell, a small contractor who operated his own construction firm in Laconia, New Hampshire, purchased a used 5½ ton dump truck manufactured and originally sold by the defendant Ford Motor Company. The truck was purchased by the plaintiff when it was a few months old and had been driven about 5,000 miles. In the approximately one year that elapsed from the purchase of the truck until the date of the accident, the plain-

tiff and his employees put another approximately 20,000 miles on the truck. The plaintiff drove the truck regularly and always used the handbrake when parking it. Plaintiff testified that, to his knowledge, during the entire period that he owned the truck prior to the accident "no adjustments or repairs of any type had been made to that handbrake".

On the day in question, while backing the truck down a slight incline to connect with a trailer, plaintiff accidentally struck the trailer and started it down the incline. He stopped the truck, took the motor out of gear, pulled on the handbrake, left the truck and pursued the trailer. The brake did not hold, and the truck backed over the plaintiff, causing him bodily injuries. The brake would have held if it had been fully applied.

Plaintiff Ernest Mitchell was 5′ 4″ tall and, accordingly, drove the truck with the seat all the way forward. Because brake wear had increased the brake lever's "travel", the lever would have come to within approximately 3 inches of the seat in the forward position if it had been fully applied at the time of the accident. Plaintiff's experts testified that the lever's shortness made full application of the brake under these circumstances awkward, especially if the user employed a particular grip or grasp. The experts also opined that a proper design would have provided a longer lever to clear the top of the seat.

As manufactured, the lever did not come close to the seat and performed its function in permitting brake application with no difficulty. Anticipating brake wear, the defendant had incorporated into its design a compensatory adjustment which would reduce the lever's travel. After the accident, one of the plaintiff's own experts made just such an adjustment. The entire process took but minutes and, according to the plaintiff's expert, made the brake "safe".

The plaintiffs brought a diversity suit in the United States District Court for the District of New Hampshire alleging negligent design of the truck brake system. A trial by jury resulted in a verdict for the plaintiff Ernest Mitchell for his personal injuries and for the plaintiff Rose Mitchell for loss of consortium. Motions by the defendant for a directed verdict and for judgment notwithstanding the verdict were denied by the Trial Court. On appeal, the Court of Appeals for the First Circuit reversed and entered judgment for the defendant on the grounds that the plaintiffs had failed to present evidence sufficient to sustain a jury verdict that the truck and handbrake system had been negligently designed by the defendant (Appendix A). The plaintiffs' petition for rehearing and motion for reconsideration were both denied by the Court of Appeals (Appendices B-F).

The plaintiffs now seek review of the decisions of the Court of Appeals by way of writ of certiorari. Plaintiffs also request that certain questions regarding the law of the State of New Hampshire concerning burden of proof and sufficiency of the evidence to withstand a motion for directed verdict be certified to the New Hampshire Supreme Court. The defendant opposes both the petition for writ of certiorari and the motion for certification.

Reasons for Refusing the Writ of Certiorari and for Denying the Motion for Certification

I. The Petition for Writ of Certiorari Should Be Denied Because the Issues Now Argued by the Plaintiffs Were Not Raised or Decided Below and No Substantial Federal Question Is Therefore Adequately Presented for Review.

The plaintiff's contention that the Court of Appeals applied standards as to the burden of proof and sufficiency

of the evidence different from those utilized by the courts of the State of New Hampshire is not substantiated by the record below.

The decision of the Court of Appeals of March 29, 1976 expressly acknowledges in the first sentence that "This is a diversity action brought in the District Court for the District of New Hampshire". Nowhere in that opinion did the Court articulate or even intimate that it was applying substantive or procedural law other than that of New Hampshire. On the contrary, the Court cited two New Hampshire product liability cases in support of its holding: *Murray* v. *Bullard Co.*, 110 N.H. 220, 265 A.2d 309 (1970) and *McLaughlin* v. *Sears, Roebuck & Co.*, 111 N.H. 265, 281 A.2d 587 (1971).

The plaintiffs first raised their present complaint concerning the standard to be applied in determining the sufficiency of evidence in their petition for rehearing. See para. 12, Petition for Rehearing, Appendix B. In its order of April 26, 1976 denying the petition, the Court of Appeals made no mention whatsoever of that issue. Indeed, the plaintiffs themselves acknowledged this fact in their moion for reconsideration wherein they complained that "This Court did not consider the constitutional issues raised in the Petition for Rehearing . . . ." See para. 6, Motion for Reconsideration, Appendix E.

The only reference in any of the opinions and orders of the Court of Appeals to the issues presented by the instant petition for writ of certiorari appear in a single sentence of the Court's May 4, 1976 order denying plaintiffs' motion for reconsideration:

> Plaintiff's claim that he was unconstitutionally deprived of a jury trial, taken at its face value, would mean that a verdict could never be directed.

The Court did not purport in that remark to address itself to the particular standards established by the law of New Hampshire for determining the sufficiency of evidence. Quite clearly, the Court was merely responding to the plaintiffs' suggestion that the Seventh and Fourteenth Amendments to the Constitution of the United States prohibited the direction of a verdict in *any* civil case tried by jury.

At no point in the proceedings below did the plaintiffs contend — as they do now — that the Court of Appeals shifted the burden of proof in contradiction to the law of the State of New Hampshire. Likewise, the defendant in its brief on appeal never urged the Court to apply any other law as to burden of proof than that of New Hampshire. Quite understandably, therefore, the Court of Appeals did not mention that issue in any of its opinions or orders.

Also advanced for the first time in their petition for writ of certiorari is the plaintiffs' contention that the Court of Appeals disregarded decisions of the Trial Court concerning the local law of New Hampshire. Presumably, the plaintiffs refer to the Trial Court's denial of the defendant's motions for directed verdict and for judgment notwithstanding the verdict. In reversing the Trial Court and entering judgment for the defendant, however, the Court of Appeals merely exercised its admitted appellate power to review issues of law. See, *e.g.*, *Dumas* v. *MacLean*, 404 F.2d 1062 (1st Cir. 1968); *Hobart* v. *O'Brien*, 243 F.2d 735 (1st Cir.), *cert. den.*, 355 U.S. 830 (1957). In so doing, the Court of Appeals did not purport to ignore New Hampshire law or the Trial Court's interpretation thereof; it merely determined that the Trial Court had misapplied the law of New Hampshire with respect to the facts of this case.

Issues which were not raised in the lower courts will not be entertained by the Supreme Court when presented initially in a petition for writ of certiorari. *McCullough* v. *Kammerer Corporation,* 323 U.S. 327, 65 S.Ct. 297, 89 L.Ed. 273 (1945); *Helvering* v. *Minnesota Tea Company,* 296 U.S. 378, 56 S.Ct. 269, 80 L.Ed. 284 (1935). Similarly, Supreme Court review will be declined where the issues presented by the petition have not been addressed by the lower courts with sufficient clarity and directness for the Court to be assured that a substantial federal question in fact exists. *Ellis* v. *Dixon,* 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955); *Rescue Army* v. *Municipal Court of the City of Los Angeles,* 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947).

In the case at bar, the record below fails to provide an adequate vehicle for the Supreme Court to appropriately exercise its power of review. The plaintiffs request this Court to further define *Eire's* delicate balance of state and federal law as applied in diversity cases on the basis of the plaintiffs' own unsupported assertions and speculations concerning the *ratio decidendi* of the opinions of the Court of Appeals below. From all indications in the record, however, the Court of Appeals purported to do precisely what the plaintiffs argue for: to apply the law of the State of New Hampshire. *See also, e.g., Wilson* v. *Nooter Corporation,* 475 F.2d 497 (1st Cir. 1973), *cert. den.,* 414 U.S. 865 (1973); *Cross* v. *M. C. Carlisle & Co.,* 368 F.2d 947 (1st Cir. 1966). In the absence of a clear statement from the Court of Appeals that it applied some articulated federal standard different from the law of New Hampshire, the Supreme Court should decline the plaintiffs' invitation to issue a gratuitous opinion in this area.

II. The Petition for Writ of Certiorari and the Motion for Certification Should Be Denied Because the Law Actually Applied by the Court of Appeals in This Case Is the Same as the Law of the State of New Hampshire and No Substantial Federal Question Is Presented for Review.

Under New Hampshire law, a verdict may be, but seldom is, directed *in favor* of a party who has the burden of proof. *Boothby* v. *Prescott,* 97 N.H. 504, 92 A.2d 661 (1952). *See also, Wright* v. *Connecticut Valley Electric Co.,* 106 N.H. 113, 206 A.2d 103 (1964). The Court of Appeals for the First Circuit has expressly acknowledged this proposition of New Hampshire law and has applied it in another diversity case to reverse the District Court's direction of a verdict in behalf of a plaintiff who had the burden of proof. *Wilson* v. *Nooter Corporation,* 475 F.2d 497 (1st Cir. 1973), *cert. den.,* 414 U.S. 865 (1973). *See also, Service Auto Supply Co. of Puerto Rico* v. *Harte & Company, Inc.,* 533 F.2d 23 (1st Cir. 1976).

On the other hand, New Hampshire law clearly authorizes the direction of a verdict *against* a party having the burden of proof. *E.g., Hadler* v. *Great Eastern Life Insurance Co.,* 109 N.H. 453, 256 A.2d 650 (1969). In ruling upon a motion for directed verdict, the courts of New Hampshire are required to construe "the evidence and all reasonable inferences therefrom" most favorably to the party having the burden of proof. *E.g., Dubreuil* v. *Dubreuil,* 107 N.H. 519, 229 A.2d 338 (1967). Evidence which is undisputed, but which is adverse to the party carrying the burden of proof, must, however, be included in the court's consideration of the motion. *E.g., Moore* v. *Phoenix Fire Insurance Co.,* 64 N.H. 140, 6 Atl. 27 (1886).

The test applied by the First Circuit to determine the sufficiency of the evidence with respect to the direction of a verdict against a proponent is precisely the same as that articulated in the case law of New Hampshire:

> The evidence must be viewed in the light most favorable to [the party bearing the burden of proof], giving him the benefit of every favorable inference that may be fairly drawn.

Dumas v. *MacLean,* 404 F.2d 1062, 1064 (1st Cir. 1968) (N.H. diversity case). *Accord, Cross* v. *M. C. Carlisle & Co.,* 368 F.2d 947, 953 (1st Cir. 1966) (N.H. diversity case). Contrary to the assertion by plaintiffs in their petition, the statement by the First Circuit in a recent Massachusetts diversity case, *Molinar* v. *Western Electric Company,* 525 F.2d 521 at 523 (1st Cir. 1975), *cert. den.,* 96 S.Ct. 1485 (1976), that it does not neglect "the uncontradicted evidence introduced by defendants" directly comports with the law and practice of the Courts of New Hampshire.

The contention in plaintiffs' petition that the case of *Carlson* v. *American Safety Equipment Corporation,* 528 F.2d 384 (1st Cir. 1976) reveals the application by the First Circut in diversity cases of some federal standard imposing a burden of proof upon a plaintiff to show himself free of contributory negligence completely misconstrues the holding of that case. In stating that "it is incumbent on the plaintiff to show that the instrumentality had not been improperly handled by [plaintiff] or by intermediate handlers", the Court was addressing itself not to the issue of contributory negligence, but to a plaintiff's special burden under the doctrine of *res ipsa loquitur* to prove that an instrumentality had been under the exclusive control of the defendant or had not been altered since it left the defendant's control. Moreover, the Court's express citation of Massachusetts authorities in support of its holding makes it apparent that the standard of proof enunciated by the Court in that case was not — as the plaintiffs herein imply — a federal standard.

The plaintiffs' entire argument in their petition concerning New Hampshire law on burden of proof and sufficiency of the evidence likewise misapprehends the decision of the Court of Appeals in this case. Contrary to the plaintiffs' fundamental assumption that the instant case was reversed on the grounds of the plaintiff Ernest Mitchell's contributory negligence, the Court of Appeals held that the *plaintiffs* had failed to sustain their burden of proof that the *defendant* had negligently designed and sold a defective product.

No one challenges the plaintiffs' contention that New Hampshire law places the burden of proof of contributory negligence upon the defendant. New Hampshire RSA 507:7-a. But the Court of Appeals in this case never reached the issue of contributory negligence. As the Court stated, "The sole issue we reach is whether there was evidence to support the jury finding of liability." On that issue, the plaintiffs have the burden of proof in New Hampshire. *Ibid.*

The holding of the Court of Appeals below was that the handbrake system on the plaintiff's truck had not been negligently designed by the defendant since its potential for danger only came into existence after substantial use caused it to noticeably wear out and the defendant had incorporated into its design a simple adjustment mechanism to compensate for that wear. As stated by the Court, "a manufacturer is not under a duty to supply materials that will not wear out". This holding is in accord with the law of the State of New Hampshire. *McLaughlin* v. *Sears, Roebuck & Co.,* 111 N.H. 265, 281 A.2d 587 (1971); *Murray* v. *Bullard Co.,* 110 N.H. 220, 265 A.2d 309 (1970).

The few references in the opinion and orders of the Court of Appeals to the maintenance of the handbrake system prior to the accident and the condition of the

system at the time of the accident were not directed to the question of the plaintiff Ernest Mitchell's contributory negligence. The significance of the facts recited by the Court concerning the lack of adjustment of the handbrake over 20,000 miles of use and its location just three inches from the seat at the time of the accident were that they unequivocally demonstrated that the brake had worn and that the alleged interference between the brake handle and the driver's seat had been caused by use and not by the defendant's design. As stated by the Court in its May 4, 1976 order denying plaintiffs' motion for reconsideration, the holding of the case was not dependent upon whether or not Mr. Mitchell himself had detected the brake wear; the holding was that the defendant was not negligent merely for designing a product that would eventually change its condition after usage and wear.

Under New Hampshire's comparative negligence law, a plaintiff is only barred from recovery because of his own negligence if his negligence exceeded that of the defendant or, to state it another way, only if his negligence was fifty-one percent or more the cause of the accident. New Hampshire RSA 507:7-a. The complete absence of any mention in the Court of Appeals' opinions and orders below of this doctrine and its applicability to the facts of this case is perhaps the strongest indication that the Court of Appeals did not reverse the Trial Court on the grounds of the plaintiff Ernest Mitchell's contributory negligence.

The plaintiffs' motion to certify questions of law to the New Hampshire Supreme Court concerning burden of proof and the standard by which to determine the sufficiency of evidence upon a motion for directed verdict is unwarranted and inappropriate in this case. The plaintiffs do not seek a clarification of New Hampshire law, but a redetermination by yet another court of the application of that law to the facts of this case. As may be gleaned from the plaintiffs' petition for writ of certiorari and this response, there is in fact no disagreement between the parties as to the law of New Hampshire on burden of proof and sufficiency of the evidence. The present dispute concerns differing views of what the Court of Appeals decided and by what standard it reached its decision. The New Hampshire Supreme Court can offer no assistance in resolving that dispute.

A writ of certiorari should not be issued to review a lower court's interpretation of unique facts bearing upon the issues of causation and negligence in an ordinary civil case. *McAllister* v. *United States,* 348 U.S. 19, 23, 85 S.Ct. 6, 99 L.Ed. 20, 26 (1954) (separate opinion of Frankfurther, J.). Those "special and important reasons" which transcend the importance of a case to its parties and which justify granting the writ in cases of national significance do not exist in the case at bar. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Because the decision of the Court of Appeals below concerns only the application of the New Hampshire law of products liability to a unique and episodic factual situation, the petition should be denied.

Likewise, the plaintiffs' motion for certification to the Supreme Court of New Hampshire should also be denied. The certification procedure should be reserved for those cases involving significant, novel or ambiguous local law issues. *See, e.g. Bellotte* v. *Zayre Corporation,* 531 F.2d 1100 (1st Cir. 1976); *Bilodeau* v. *Oliver Stores,* 115 N.H. ——, —— A.2d —— (February 27, 1976). Additionally, when a motion to certify is made at the Supreme Court level, it should only be granted when the state law issue is essential to a review of the case and when the case itself otherwise warrants the issuance of a writ of certiorari.

The case at bar does not satisfy any of these criteria. The issues of law proposed by the plaintiffs to be certified are neither novel to New Hampshire nor of significance to the nation. More importantly, even if the New Hampshire Supreme Court were to respond that it would have decided the case differently from the Court of Appeals, the record from the Court of Appeals will not reveal whether such a difference would have resulted from the application of contrary rules of law — as the plaintiffs would contend — or only from an honest disagreement as to the application of the same law to the facts of this case. Such ambiguity does not yield an appropriate case for the granting of a writ of certiorari and should therefore also result in the denial of the motion to certify.

III. EVEN IF THE COURT OF APPEALS DID APPLY A FEDERAL STANDARD OF SUFFICIENCY OF THE EVIDENCE AND EVEN IF THAT STANDARD WAS DIFFERENT FROM THAT APPLIED BY THE STATE COURTS OF NEW HAMPSHIRE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PREDOMINANT FEDERAL INTEREST IN THE UNIFORMITY OF ITS JURY TRIAL PROCEDURE DICTATES THE APPLICATION OF THE FEDERAL STANDARD.

As discussed above, a careful reading of the decision of the Court of Appeals clearly reveals that the Court reversed the jury's verdict on the grounds that there was insufficient evidence of the defendant's causal negligence, and not on the grounds that there was overwhelming evidence of the plaintiff's contributory negligence. The plaintiffs' contention that the Court of Appeals shifted the burden of proof of contributory negligence from the defendant to the plaintiffs in contradiction to the law of New Hampshire is therefore wholly without merit and no discussion of the impact of the *Eire* doctrine upon that

issue is required. *See generally, Palmer* v. *Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

As also discussed above, the standard applied by the First Circuit Court of Appeals for judging the sufficiency of the evidence is identical to or at least substantially the same as that of New Hampshire; this case is therefore not an appropriate one for the Supreme Court's elucidation of the *Eire* doctrine in this area. See *Mercier* v. *Theriot,* 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964); *Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). Assuming *arguendo,* however, that the Court of Appeals did utilize a different standard from that of New Hampshire and that the differences between the federal and the New Hampshire standards could be ascertained from the record below, the *Eire* doctrine would not mandate the application of the State standard.

In a pre-*Eire* case, *Herron* v. *Southern Pacific Co.,* 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931), this Court held that a Federal Court in a diversity case could direct a verdict on the ground of a plaintiff's contributory negligence despite a state constitutional provision requiring submission of that issue to the jury in all cases. The viability of this decision after *Eire* was affirmed by the Court in *Byrd* v. *Blue Ridge Electric Co-op,* 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958).

Although the issue of the sufficiency of the evidence to withstand a directed verdict is quite similar to that addressed by this Court in *Herron,* this Court has not expressly determined whether a Federal or State standard is applicable in diversity cases. Several of the Circuit Courts of Appeals, however, have reached this issue and the better reasoned decisions have applied a Federal rule. *E.g., Wratchford* v. *S. J. Grove & Sons,* 405 F.2d 1061 (5th Cir. 1969); *Safeway Stores* v. *Fannan,* 308 F.2d 94 (9th Cir. 1962). *See also,* 5 MOORE'S FEDERAL PRACTICE

§38.10, pp. 107-108 (1976); Wright, HANDBOOK ON THE LAW OF FEDERAL COURTS §92, pp. 403-4 (2d ed. 1970).

In a case such as the present one, the issue of sufficiency of the evidence is not integrally related to the substantive rights asserted by the parties; the present case is merely a common law negligence action which shares the standard for judging sufficiency of the evidence with all other civil actions. No substantial State interest peculiar to negligence actions inheres in the New Hampshire rules on sufficiency of the evidence.

A substantial Federal interest, however, in uniformity and consistency within its system has consistently been recognized in diversity cases dealing with the distribution of trial functions between judge and jury. *E.g., Simler* v. *Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963).

The primacy of the Federal interest over competing State considerations with particular respect to standards for determining the sufficiency of evidence has best been stated by Chief Justice Haynsworth of the Fourth Circuit,

> In a diversity case, state law defining and limiting those primary rights and obligations must be applied under the *Eire* doctrine, enabling members of society prudently to plan and conduct their affairs, whether their conduct will later be called into question in a state or federal court. A choice of a rule as to the quantum of proof necessary to support the submission of a case to a jury plays no role in the ordering of the affairs of anyone. It is not the kind of rule which must inexorably find its governance in a diversity case in the corpus of state law. Indeed, unless one accepts the "outcome — determinative" test as both inflexible and universal, there is little in this situation to support the choice of the state rule as opposed to the federal.

Wratchford v. *S. J. Groves & Sons Company, supra,* at 1065-6.

Even assuming, therefore, that in this case the Court of Appeals applied a federal standard of sufficiency of the evidence and that such standard was different from that of New Hampshire, the absence of any compelling New Hampshire interest inherent in its substantive law of negligence would mandate the application of the Federal standard. Consequently, the writ should be denied.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari and the Motion for Certification to the New Hampshire Supreme Court should be denied.

Respectfully submitted,

EUGENE M. VAN LOAN, III, ESQUIRE
95 Market Street
Manchester, New Hampshire 03101
Counsel for Respondent

July 14, 1976

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
(HON. HUGH H. BOWNES, *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

Eugene M. Van Loan, III, with whom *Wadleigh, Starr, Peters, Dunn & Kohls* was on brief, for appellant.

David J. Killkelley, with whom *Nighswander, Lord, Martin & Killkelley* was on brief, for appellees.

March 29, 1976

ALDRICH, *Senior Circuit Judge*. This is a diversity action brought in the District Court for the District of New Hampshire against a manufacturer for personal injury allegedly due to a defectively designed brake lever (handle) on a dump truck. The sole issue we reach is whether there was evidence to support the jury finding of liability.

On plaintiff's evidence plaintiff, a contractor, purchased the truck when it was a few months old, and had been driven about 5,000 miles. Approximately one year and

20,000 miles later, the accident occurred. Plaintiff was not the sole user of the truck, but he drove it regularly. On the day in question, while backing down a slight incline to connect with a trailer, he accidentally struck the trailer and started it down the incline. He stopped the truck, took the motor out of gear, pulled on the handbrake, left the truck, and pursued the trailer. The brake did not hold, and the truck backed over him. The brake would have held if it had been fully applied.

Plaintiff was 5′ 4″ tall and, accordingly, drove the truck with the seat all the way forward. Because of brake wear, which increased the lever's "travel," if fully applied at the time of the accident the lever would have come to within three inches of the seat in the forward position. Plaintiff's experts testified that, because of its shortness this made application awkward, especially if the user employed a particular grip or grasp, and that, in their opinion, a proper design would have provided a longer lever to clear the top of the seat. Although defendant asserted a reason for the supplied length, we accept plaintiff's experts' opinion, but subject to other established factors which have a bearing on the ultimate conclusion.

As manufactured, the lever did not come close to the seat. Anticipating wear, defendant had provided a compensatory adjustment. After the accident such an adjustment was made. It took but minutes. While not, of course, determinative, there was no affirmative evidence that defendant was ever aware of a handle problem.[1]

Before addressing basic principles, we must fault plaintiff's brief in two particulars. First, it says that the defect

[1] Defendant offered to show, negatively, that it had sold this truck in large numbers for a period of years without any claim on the design of the lever. Plaintiff objected, saying it was highly prejudicial, and that the rule allowing evidence of prior accidents "does not work in the negative." The court agreed. We need not reach this question, but note *Menard* v. *Cashman*, 1945, 93 N.H. 273, 274; *Pittman* v. *Littlefield*, 1 Cir., 1971, 438 F.2d 659, 662.

was not obvious. Secondly, it says plaintiff should not have to "continuously make an adjustment to the brake to fit his height" "every time (he) uses the truck." These are patent attempts to shift the facts to avoid the issues. Of course the defect—if it was a defect—was obvious. There was no suggestion that anything had gone suddenly wrong. Brake wear is gradual, and in the case of the handle's changed position, perceptible. We refrain from answering plaintiff's brief's other contention, that a condition that developed during 25,000 miles and had never been corrected, would require adjustment "every time he uses the truck."

Even the strict admiralty doctrine of unseaworthiness—liability without fault—does not require perfection. *See Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550; *Doucette* v. *Vincent*, 1 Cir., 1952, 194 F.2d 834, 837-38. There is probably little that could not be improved, or, at least, that some person having sufficient qualifications to be called an expert would not say could have been improved, selecting, after the event, which design would have been better. That, however, is not the test. As the court said in *Weakley* v. *Fischbach & Moore, Inc.*, 5 Cir., 1975, 515 F.2d 1260, at 1267-1268,

> "[Plaintiffs] rely principally on an attempted showing that there were design alternatives which, had they been adopted, would have prevented the accident or minimized its consequences. Such a showing, by itself, is insufficient to establish liability . . . It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous. The defendant is not obliged to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe. W. Prosser, The Law of Torts § 96 at 645 (4th ed. 1971)."

In *Brown* v. *General Motors Corp.*, 4 Cir., 1966, 355 F.2d 814, at 820, cert. denied, 386 U.S. 1036, the court said,

> "Failure to adopt the most modern, or even a better safeguard, did not render the manufacturer liable to the injured mechanic . . . There is no indication in the evidence that the shield was not at least a reasonable preventive of injury."

Brown was cited with approval by the New Hampshire court in *Murray* v. *Bullard Co.*, post.

To come to specifics, a manufacturer is not under a duty to supply materials that will not wear out. *McLaughlin* v. *Sears, Roebuck & Co.*, 1971, 111 N.H. 265, 268; 281 A.2d 587, 589. There the court said,

> "The duty of the manufacturer or supplier is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated. Prosser, Torts 667 (3d ed. 1964); . . . Clearly there is no duty to furnish a product that will not wear out."

Plaintiff points out that an expert witness, called by defendant, testified that he "wouldn't think he'd make any adjustments unless it found it non-functional." This is not only contrary to defendant's operating manual's instructions to check brakes, but is contrary to common sense. An emergency brake that must fail before attention is to be given it, by hypothesis cannot be depended upon in an emergency. Nor is this the law. The user of a mechanism that is known to be subject to wear must do more than simply repair it after it fails. The contrary opinion of some witness, even though he may qualify as an expert, does not change the result; questions of law are for the court. The law is that a manufacturer does not have to anticipate that maintenance will be neglected. In *Murray* v. *Bullard Co.*, 1970, 110 N.H. 220, 225; 265 A.2d 309, 313, the court approved the principle that defendant "is not

liable where 'injury results from a failure to keep the manufactured product in good working order.' "

As was said in *Kaczmarek* v. *Mesta Mach. Co.*, 3 Cir., 1972, 463 F.2d 675, at 678,

> "Common sense dictates that there should be frequent if not periodic inspections and replacement of the worn parts as soon as they are detected."

Plaintiff's own expert testified,

> "[T]he adjustment should be checked periodically; . . . you are put on the alert for changing the adjustment if you find it is getting too loose or that the handle is coming back too far." (R. 194).

Instead, plaintiff is claiming that a dump truck's brake assembly should be so perfect that he should not be required to maintain it, or make use of the adjustment feature provided, even though the wear was apparent, and that after 25,000 miles it should work as it did at the beginning.

Product liability in the individual case is paid for by the manufacturer, or its insurer, but in the long run whatever standard has to be met is reflected in the cost of the product. A standard that would permit an owner to neglect wear which is expectable and apparent, not to mention easily remediable by a design provision, imposes altogether too high a burden.

Reversed. Judgment for the defendant.[2]

---

[2] In fairness to the district court, since no case cited in this opinion, except one in the footnote, was furnished us by the defendant, presumably none was to it. Where the verdict runs into six figures we believe courts have a right to expect a modicum of diligence on the part of counsel.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

PETITION FOR REHEARING

Introductory statement pursuant to Rule 15 of the Rules of the United States Court of Appeals for the First Circuit: The arguments and matter set forth in this Petition for Rehearing were not presented to the Court before because the Defendant, Ford Motor Company, never presented to the Trial Court or the Appellate Court the reasoning stated in the Court's opinion, the Plaintiffs did not anticipate that this Court would misconstrue the Plaintiffs' argument, the Plaintiffs were not aware until the Court's decision that there was to be any claim that the defect or dangerous condition of the product was obvious as a matter of law, and the Plaintiffs were not on notice of the misapprehension of the facts and the misapprehension of the points of law as stated herein below until the Circuit Court's decision.

The Plaintiffs in the above-entitled matter respectfully petition for a rehearing and they specifically assign as reasons therefor the following:

1. In its decision, the Circuit Court appears to state that the Plaintiff, Ernest F. Mitchell, Jr., was the owner

of the truck involved in the accident. On the contrary, the evidence showed that the truck was owned by Mitch's Construction Company, Inc. Mr. Mitchell testified that he purchased the truck for the business (R. 282) which was called Mitch's Construction Company, Inc., a corporation. (R. 281 and Exhibit 13 including corporate income tax returns).

2. In its decision, the Circuit Court claims at page 2 that Ernest F. Mitchell, Jr. used the truck in question "regularly". The extent of use made by Mr. Mitchell of the truck was clearly a jury issue. Mr. Mitchell testified he used the truck "quite often" and "numerous times". (R. 320). It was a question of fact as to whether Mr. Mitchell used the truck regularly or irregularly. The Court should not have held that as a matter of law the Plaintiff used the truck "regularly".

3. At page 3 of its decision, this court claims:

> "... if fully applied at the time of the accident the ... (brake) ... lever would have come to within three inches of the seat in the forward position."

This is not correct. The only measurement given for this distance was the measurement determined by Mr. Cromwell in March of *1974* as shown on Plaintiffs' Exhibit 27 attached as Appendix to Plaintiffs' Brief. The accident occurred on June 15, *1973*. The jury could conclude that the distance may have been more. This was a question of fact and this Court should not have concluded as a matter of law that the lever was three inches from the seat at the time of the accident.

4. At page 3 of this Court's opinion the Court claims:

> "As manufactured, the lever did not come close to the seat."

This statement is not correct. The brake lever was improperly *located* close to the seat "far reaching to the right." The jury had the opportunity to view the truck,

the brake's location, and to accept the following testimony of Mr. Cromwell, Plaintiffs' expert:

> "I ... found that the parking brake handle was so short that it did not extend above the level of the seat upon which the operator sits. It was in such a position, far reaching to the right, and low to the seat, that it was extremely difficult to put this brake on to a point that would assure the operator that it was securely fastened. As you pull the brake rearward, the mechanical advantage is so poor because your arm has to come up and you put a component on the brake handle of pulling it off of the floor, really almost as much as you have pulling it to the rear. It is an extremely difficult situation. I would consider it dangerous." (R. 362).

The brake lever was improperly located in the truck close to the seat as manufactured. The jury could easily come to this conclusion. The Appellate Court should not have concluded otherwise.

5. At page 3 of its opinion, this Court claims:

> "Anticipating wear, Defendant had provided a compensatory adjustment." Ford *never* claimed that the adjustment feature in the emergency brake system was for the purpose of protecting the driver from seat interference in the application of the emergency brake. This common adjustment feature is provided for the proper *functioning* of the brake. Ford's supervisor of design analysis admitted this. Ford *never* claimed otherwise in any of the testimony in this case. Ford *never* claimed the adjustment feature was to be used to compensate for a defect in the design of the height and location of the brake lever.

6. This Court ruled as a matter of law that:

> "The defect ... was obvious." (Page 4 of the opinion).

In the District Court, the Trial Judge and the jurors had the opportunity to observe the witnesses who testified and their demeanor. They had the opportunity to view motion picture films of the application of the brake in this type of truck and the location of the brake in relation to the seat and how it is applied. (Defendant's Exhibit 34 for Identification). Indeed, at the view the jurors had the opportunity to examine the *actual truck* involved in this accident. They viewed the brake handle, the brake lever, and the seat. They were able to determine the emergency brake's relation to the seat. The jurors, representing a true cross-section of the community, applied their common experience to all of this evidence. The conclusion is inescapable that the seat interference with the proper application of the brake was *not* open and obvious. The supervisor of design analysis for Ford Motor Company (R. 518) claimed that there was not seat interference. (R. 424). There was admitted in evidence, a series of photographs taken, and the motion picture films, all presented by Ford claiming there was no seat interference in the application of the brake. See Plaintiffs' Exhibit 30 (1-33) consisting of 33 photographs presented by Ford. Also, the motion picture film, Defendant's Exhibit 34 for Identification. The record in this case does not in any way justify a ruling as a matter of law that the dangerous condition caused by the defect in the design of the hand brake was obvious to the ordinary person. The supervisor of design analysis for Ford testified that there were no "problems with seat interference . . . with the seat in the fully forward position." (R. 424). Ford, therefore, continually denied there was a defect or any dangerous condition. If the supervisor of design analysis from Ford Motor Company says that he sees no dangerous condition, then it certainly is at least a jury issue as to whether the dangerous condition is apparent to the ordinary person. As part of its ruling that the defect was obvious, this Court

has ruled as a matter of law that the brake ". . . handles changed position . . . (is) . . . imperceptible." (Page 4 of the opinion). This is not correct. When the brake is adjusted in its original adjustment, the brake goes to the fourth (4th) or fifth (5th) tooth of the pawl when the brake is in its applied position. (R. 639). There are thirteen (13) teeth on the pawl. (R. 185, 638 and 639). Photographs were taken when Mr. Edelen, Ford's expert, made his inspection of the truck in October of 1974. (R. 521). The jury could conclude that the brake was in the same condition of adjustment in October of 1974 as it was in June of 1973 at the time of the accident. Compare photographs, Plaintiffs' Exhibit 30 (1-33) with Plaintiffs' Exhibit 8-C. Yet, Mr. Edelen found the brake to be in the *sixth* (*6*) tooth of the pawl in its applied position at the time of his inspection of the truck. (R. 639). Mr. Carroll, who examined the truck within a month after the accident, testified as follows on cross-examination:

> "Now, when you normally apply this brake, when a person normally applies it, he would go back to have it in a full position, would you say, half way, the fifth or sixth tooth, seventh tooth, in that area?
>
> A. Approximately, yes."

(R. 185). The jury could easily conclude that the brake was in the sixth (6th) tooth on the pawl at the time of the accident. It is most unfair for the Appellate Court to conclude as a matter of law that the "travel" of the brake handle from the fourth (4th) tooth to the sixth (6th) tooth on a pawl of thirteen (13) teeth is "perceptible." Common everyday experience would lead an ordinary person to conclude otherwise. The issue of the openness and obviousness of the defect or dangerous condition was at the very least a jury issue.

7. On page 4 of this Court's opinion, this Court states: "There was no suggestion that anything had gone suddenly wrong."

On the contrary, the Plaintiffs' claim, through their experts, was based on the fact that the brake could not be properly applied in an *emergency* situation. In this case there was a sudden inability to fully apply the brake in an emergency because of the combination of the improper location and height of the lever. The improper application of the emergency brake in an *emergency* was argued throughout the Plaintiffs' Brief, see particularly page 44 of Plaintiffs' Brief. There was no evidence that Mr. Mitchell had ever had any need to previously apply the emergency brake in a sudden emergency. The interference with the brake's proper application created an active dangerous condition only when the brake had to be applied in an emergency or sudden stress situation. This claim of the Plaintiffs was advanced in both experts' reconstruction of this accident. An emergency brake which cannot be applied properly cannot be depended upon in an emergency. The Plaintiffs' case was based on the sudden manifestation of the defect in the design of the brake because o fthe emergency. The Court overlooked this part of the Plaintiffs' argument and evidence.

8. On page 4 of this Court's opinion, it is stated:

> "We refrain from answering Plaintiffs' Brief's other contention, that a condition that developed during 25,000 miles and had never been corrected would require adjustment 'every time he uses the truck'."

The Court has misconstrued the Plaintiffs' argument. Plaintiffs did *not* contend in their Brief that the "condition" of the brake would require adjustment every time the driver uses the truck. The Plaintiffs' Brief reveals that the Plaintiffs claimed in their Brief that the manufacturer could not expect constant adjustments to the brake. See Plaintiffs' Brief, page 6, wherein it is stated:

> "Relying on constant adjustment of the brake . . . to keep it in its original tight adjustment without allowing any 'travel' of the brake handle certainly is not justified."

The supervisor of design analysis for Ford agreed that one would expect that the seat in the cab of the truck would be adjusted to fit the driver's height every time a person uses the truck but constant adjustment is not expected relative to the riser under the seat or the brake adjustment feature. (R. 610 and 611). Plaintiffs' Brief, page 7. The adjustments made to the emergency brake by a mechanic are determined by considerations of keeping the brake functional. Furthermore, the Plaintiffs *never* contended that any "condition" developed during 25,000 miles. Nor that the "condition" had "never been corrected." In the Court's opinion at pages 8 and 9, the Court states:

> ". . . Plaintiff is claiming that a dump truck's brake assembly should be so perfect that he should not be required to maintain it, or make use of the adjustment feature provided, even though the wear was apparent, and that after 25,000 miles it should work as it did in the beginning".

The Plaintiffs *never* made these claims. The Court is ruling as a matter of law that: (a) Mr. Mitchell did not properly maintain the truck; (b) he did not make use of the adjustment feature; (c) wear was apparent; and, (d) the brake wore for 25,000 miles. On the contrary, there was more than adequate evidence in this case from which a jury could conclude that the truck *was* properly maintained, the adjustment feature was reasonably utilized, the "wear", if there was any wear, was not apparent and the brake lining did not wear during 25,000 miles of use. Mr. Mitchell had used the emergency brake when he used the truck by the Company had as many as four other employees. (R. 281). Obviously, it is not the amount of mileage traveled but the number of times and the manner of application which determines the amount of wear of

the brake lining. It would be reasonable for the jury to conclude that Mr. Mitchell's use of the truck may have only been ten or twenty percent of the time, in other words, approximately 2,000 to 4,000 miles. Mr. Boynton, the foreman of Mitch's Construction Company, Inc., usually used the truck in question. He testified that he *didn't use* the emergency brake. (R. 72). The jury could conclude that the brake lining did not wear to any degree during the use of the truck before the accident. It is unfair for the Appellate Court to conclude otherwise as a matter of law. Also, the jury could have concluded certainly that any wear of the lining was not apparent to the ordinary person. The change of the brake from the fourth (4th) tooth to the sixth (6th) tooth on the pawl is so minimal that it is manifestly unfair to conclude that such "wear" is "apparent" as a matter of law. Furthermore, there was abundant evidence in this case from which a jury could definitely conclude that the brake assembly of the truck involved in the accident *was* properly maintained and reasonable use made of the adjustment feature. Mr. Warren Boynton, foreman of Mitch's Construction Company, Inc., was in charge of general maintenance of equipment. (R. 329). Although Mr. Mitchell stated that he had no "knowledge" of adjustments or repairs to the brake, he did state that he had the truck inspected as required by the State and that when that was done, the garage would ". . . check everything. They would check the brakes, the whole works . . ." If they found something wrong:

> "They either repair it or they don't put a sticker on it." (R. 329).

From this testimony the jury could certainly conclude that Mitch's Construction Company, Inc. had reasonable maintenance done to the truck including full checking of the brake assembly at least semi-annually. The jury could conclude that this conformed to the standard of care of

the ordinary prudent truck owner. *In addition,* before the accident the truck had been taken to Genest Ford Garage on at least two occasions for warranty servicing. (R. 71). It is reasonable to assume that Ford's dealer checked the brake assembly and properly performed maintenance when the truck was at its garage. It is, therefore, most unfair for this Court to now conclude that the truck or the brake assembly was not properly maintained. Also, Mr. Boynton performed minor servicing on the truck, (R. 71), to keep it in proper condition. Under all these circumstances, it would be perfectly reasonable for the jury to conclude that Mitch's Construction Company, Inc. did properly maintain the truck in accordance with what an ordinary truck owner would do under the circumstances.

9. It appears that this Court has ruled as a matter of law that the manufacturer is not liable because it should not have to anticipate the circumstances of this accident. Such a decision misapprehends the facts and the law. The instant case involves the failure of the manufacturer to use due care in the design of a product. There is absolutely no question that the manufacturer should have anticipated that this Ford truck would be used in an emergency situation with the seat in its most forward position and the brake lever at approximately the sixth (6th) tooth on the brake pawl. Ford never claimed otherwise. It is contrary to all legal principles for this Court to rule as a matter of law that the manufacturer could not reasonably anticipate such a situation.

10. The reasons set forth in this Court's opinion were never advanced by Ford in the District Court. This was pointed out on page 20 of the Plaintiffs' Brief. This Court seems to be relying on its own conclusion that the emergency brake in the truck in question was in need of adjustment as a matter of law at the time of the accident. This was a jury issue and the Trial Judge properly submitted

this issue to the jury. The jury could believe the Ford supervisor of design analysis when he testified that the adjustment position of the brake as found by Mr. Carroll after the accident was not "improper." The supervisor of design analysis was asked at the time of his video tape deposition to view the enlarged photograph taken by Mr. Carroll shortly after the accident. This photograph was marked as Plaintiffs' Exhibit 9 and is reproduced in smaller print as Exhibit 8-C on page 510 of the Appendix. The video tape deposition was presented to the trial judge and jury as part of the evidence in this case. While viewing the enlarged photograph (Exhibit 9) the supervisor of design was asked:

> "Assume that that is in the same applied position on that photograph . . . is the adjustment of the brake in any way improper for it to be in the position that it is?"

The jury was entitled to believe the immediate answer of the design supervisor, namely:

> "It doesn't look like it to me." (R. 627).

Ford's representative did not even find anything improper with the adjustment position of the emergency brake at the time of the accident. This Court has unfairly ruled on appeal in direct contradiction to the facts as they were presented to the Trial Judge and jury.

11. The legal principles set forth in the cases cited in this Court's opinion were never advanced by Ford. In fact, the cases cited in this Court's opinion do not justify this Court's conclusion. The admiralty case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 cited on page 5 of the opinion involved a case which was reversed because of an improper instruction to the jury. The case was returned to the Trial Court for a trial on jury issues. The admiralty case of *Doucette* v. *Vincent*, 194 F 2 834 cited on page 5 of the Court's opinion dealt with the issue of whether a

trial judge abused his discretion in excluding evidence. This Court's opinion at page 5 cites the case of *Weakley* v. *Fischbach & Moore, Inc.*, 515 F (2) 1260, for the proposition that the fact that there are other design alternatives available is not a sufficient standard. The *Weakley* case held that there was:

> ". . . a consensus among electricians and designers that the equipment in question was safe if properly installed. There was also uncontradicted testimony that the design of the isolator switch was consistent with good engineering practice, . . . electricians and designers were agreed that the substitution of jumper wires for the door switches was a substantial and unjustified departure from design requirements . . . Against this evidence that the equipment was reasonably safe as designed, Fischbach and Moore mustered little contrary evidence . . . (page 1268) . . . it produced no expert testimony to support its contention that the design was unreasonably dangerous." Page 1269.

The evidence in the instant case was substantially different from the *Weakley* case. In the instant case, two experts for the Plaintiffs testified that the design of the emergency brake's location and height did *not* conform to good engineering practices. Ford did *not* offer any expert testimony that the brake did conform to good engineering practices. The Plaintiffs' experts were virtually uncontradicted. The *Weakley* case is not applicable to the facts in the instant case. This Court's opinion at page 6 cites the case of *Brown* v. *General Motors Corp.*, 355 F (2) 814. The *Brown* case held that acts of the plaintiff and co-employee in touching a starter button to rotate a drive shaft facilitating lubrication established utter want of compliance with the condition that the machine be operated in the manner intended. The decision claimed that the co-employee was "groping in the dark." 355 F(2), at page 820. In the *Brown*

decision there was *no* expert testimony that the manufacturer was negligent in removing a micro switch and substituting therefor a shield. The plaintiff claimed there should have been a micro switch but presented no evidence that lack of a micro switch was negligence. The evidence in the instant case differs substantially from the *Brown* case. In the instant case there *was* substantial evidence, through experts, that Ford was negligent in the design of the emergency brake. Also, on page 6 of this Court's opinion, it is stated that:

> "*Brown* was cited with approval by the New Hampshire Court in *Murray* v. *Bullard Co.*, post."

The *Murray* v. *Bullard Co.* case, 110 NH 220 cited the *Brown* case merely for the general principle that a manufacturer is entitled to assume that a product will be put to normal use. *Murray* v. *Bullard,* 110 NH at page 225. In its opinion at page 8, *Kaczmarek* v. *Mesta Mach Co.,* 463 F (2) 675 is cited by this Court. The *Kaczmarek* case involved an action against a manufacturer of a chain used as a component part of a pickling machine. The machine had malfunctioned. There were no witnesses because the injured party died. Experts testified that the chain caused the accident. However,

> "No evidence is present in the record going to the specific nature of the defect in the chain." 463 F (2) at page 678.

Also, the chain had changed from the one-inch density as supplied as a result of two years use. 463 F (2) at page 678. The *Kaczmarek* case is substantially different from the instant case. In the instant case there was expert evidence of the specific nature of the defect in the brake. In the instant case, as stated before, there was sufficient evidence for the jury to determine that the product was being used as was reasonably anticipated by Ford. The abstract legal principles cited in the Court's opinion do not justify this

case from the jury since there was abundant evidence to establish that there was no violation of the mandates of these principles.

12. This Court's decision is contrary to the law of New Hampshire. Under well-established principles, this Court is obligated to apply the law of New Hampshire to the evidence in this case. There is no question that the Supreme Court of New Hampshire would hold that there was sufficient evidence in this case to support the jury's finding of liability. In fact, no case can be found throughout the country which goes as far in taking issues from the jury as this Court's opinion in the instant case. Only two New Hampshire decisions are relied upon by this Court in its opinion, namely, *Murray* v. *Bullard,* 110 NH 220 at page 8 of the opinion and *McLaughlin* v. *Sears, Roebuck & Company,* 111 NH 265, at page 7 of the opinion. The Court cites the case of *Murray* v. *Bullard Company* for the principle that the Defendant is not liable where injury results from failure to keep the manufactured product in good working order. The *Murray* v. *Bullard* decision upheld a verdict for the Plaintiff against a manufacturer of a machine and held that this principle is the same as the principle of "intervening cause". See page 222 of 110 NH 220. The New Hampshire Supreme Court held that the Defendant's seventh request for instructions to the jury in this case, namely:

> "If you find that the Plaintiff's injuries were solely due to an independent intervening cause, namely, the failure of . . . the Plaintiff's . . . employer . . . to properly keep the clutch . . . in proper adjustment, which the Defendant . . . could not reasonably be found to have the duty to foresee, and that this failure was the proximate cause of the injuries, then you must bring back a verdict for the Defendant."

In other words, the New Hampshire Supreme Court has stated that the issue of the failure to keep the manufactured product in good working order *is a jury issue.* In the instant case, the jury could very well conclude that the truck in the instant case had been properly maintained under the standards of what would be required of an ordinary truck owner. The instant case is no different from the *Murray* v. *Bullard* decision. In its opinion, this Court has also cited the New Hampshire case of *McLaughlin* v. *Sears, Roebuck & Company.* The *McLaughlin* case specifically *sustained an exception to a non-suit* and granted the plaintiff a new trial based on the New Hampshire Supreme Court's determination that it was a *jury issue* as to whether the use of the manufactured product constituted a misuse or an abnormal use for which the manufacturer was not responsible. In the *McLaughlin* case the Court also stated that:

> ". . . a manufacturer or supplier has distributed a defective product when it is so fragile that its anticipated use is likely to create a dangerous condition." 111 NH 265 at page 268.

There is no case in New Hampshire which has ever held that these issues can be taken from the jury by judicial fiat. In the instant case, the Trial Judge, who was in a better position to judge the quality of the evidence and who is familiar with the New Hampshire law, found that a jury issue exists.

13. In the instant case, the Plaintiff is not claiming that the brake assembly should be perfect and that he not be required to maintain it or make use of the adjustment feature. The Plaintiff is only maintaining that the location and height of the brake lever should have been designed so as to be *reasonably* safe for a use that could *reasonably* be anticipated. These were *jury* issues.

14. It was for the *jury* to say whether the accident was caused by improper maintenance of the truck. It was for the *jury* to say whether the owner of the truck neglected to make proper use of the adjustment feature provided. It was for the *jury* to say whether the "wear," if any, was apparent. It was for the *jury* to determine whether the wear, if any, of the product was "easily remedial by a design provision." All of the above determinations were made as a matter of law by the Circuit Court when, in fact, there was abundant evidence from which the *jury* could reasonably reach a contrary conclusion.

15. For all of the reasons set forth in this Petition, the Plaintiffs will be denied constitutional rights of due process and trial by jury if this Court permits its present decision to stand.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,
PLAINTIFFS, APPELLEES,
v.
FORD MOTOR COMPANY,
DEFENDANT, APPELLANT.

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.
PETITION FOR REHEARING, ETC.
MEMORANDUM AND ORDER ON

Entered April 26, 1976

The petition for rehearing makes points that fall into two categories. The first falls outside the prime purpose of a petition, viz., to present errors of consequence that might reasonably be thought to have materially affected the outcome. It is totally irrelevant to the decision that we spoke of plaintiff, rather than the corporation, as being the truck's owner.* The difference between driving "regularly," and "quite often," is equally frivolous. So, too, so far as the present posture is concerned, is what plaintiff claims defendant claims.

---

* Note that Plaintiff in his opening, spoke of "his 1972 Ford truck," and in his testimony referred to the corporation as his "own construction business," and that he was in "business for [him]self."

Secondly, in addition to being of substantive importance, a petitioner's contentions must be consistent with his position at the trial. We cannot accept plaintiff's present contention, twice repeated, that the jury could find that "the truck *was* properly maintained, the adjustment feature was reasonably utilized." (Emphasis in orig.) Plaintiff himself testified that so far as he was aware "no adjustments or repairs of any type had been made to that handbrake." No witness testified to the contrary.

Equally inconsistent is his objection to the court's statement that the lever at the time of the accident came to within 3" of the seat, when "the distance [then] may have been more." Plaintiff's brief relied on his expert's opinion, which predicated 3". Of more general import, the whole theory of the experts, and of plaintiff's brief, was that the lever was too close to the seat—"interference with the seat when the seat was in its most forward position." If we made the distance too short, this was not a mistake in plaintiff's disfavor.

Finally, we note plaintiff's present claim that the jury could have found that the brake lever was located too close to the seat in the first place, and that any wear was imperceptible. We pass the inconsistency between this and the complaint discussed in our previous paragraph, but cannot pass over what plaintiff advanced in his opening as the theory of his case.

> "[A]s the brake lining wears, which is anticipated, then the travel of the lever of the brake then becomes greater in its rearward movement, and the wearing of the brake lining makes the travel, as I say, of the rearward movement of the brake greater. The function of the brake is still adequate, but with use, as it is applied, its travel goes further. And, as it would travel further rearward, this risk of interference with the seat would become greater. If a person of short stature is in the

truck, the truck [sic] has to be in its most forward position, and if the brake lining was worn, which can be anticipated *and seen by the driver,* then you have the interference as is shown in the photograph which is before you." (Emphasis suppl.)

This language was substantially repeated in plaintiff's brief on appeal. His witness's testimony corresponded. But if we were to think the record permitted plaintiff's present argument, then he is in the position of having driven the truck for over a year during all of which time the seat interfered with the proper application of the brake.

The petition is denied, as are plaintiff's other motions.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

MOTION TO STRIKE FROM MEMORANDUM AND ORDER ENTERED APRIL 26, 1976 THE REFERENCE TO PLAINTIFF'S OPENING STATEMENT, OR FOR ALTERNATIVE RELIEF

Now Come the Plaintiffs, Ernest F. Mitchell, Jr. and Rose L. Mitchell, in the above-entitled matter and respectfully move to strike from the Memorandum and Order on Petition for Rehearing, etc., entered by this Court on April 26, 1976 the reference to the Plaintiffs' Opening Statement wherein it is quoted *"and seen by the driver . . ."* or, in the alternative, remand this case for an evidentiary hearing on the correctness of this statement in the record, and the Plaintiffs assign as reasons therefor, the following:

1. The statement reported therein was not correctly reported. The Plaintiffs' counsel's position was that the conditions stated can be anticipated *and foreseen by the designer.*

2. In the very next paragraph of the Opening Statement, Plaintiffs' counsel related the claim that the designer had the duty to warn of these conditions. (R. 23). In fact, the entire Opening Statement in the paragraphs preceding and

following the quoted language related to the designer's responsibilities (R. 22 and 23). The quoted report of the Opening Statement is clearly a mistake.

3. Allowing the present record to stand will be unjust.

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

MOTION FOR RECONSIDERATION

Now Come the Plaintiffs, Ernest F. Mitchell, Jr. and Rose L. Mitchell, in the above-entitled matter and respectfully move that this Court reconsider its order denying Plaintiffs' Petition for Rehearing and other motions, said order entered April 26, 1976, and the Plaintiffs assign as reasons therefor, the following:

1. The record reveals that the Plaintiffs' Petition for Rehearing and Application for In Banc Rehearing was presented to three judges who voted not to rehear this matter in banc. The record also reveals that one of the judges voting on whether to rehear the case in banc is a senior judge. In the case of *Moody* v. *Albemarle Paper Company,* decided June 17, 1974, 417 U.S. 622, 41 L. Ed. 2d 358, 94 S. Ct. 2513, the United States Supreme Court held that a senior judge may *not* participate in the determination whether to rehear a case in banc. The *Moody* case was cited by the Plaintiffs in their application previously filed.

2. The reported decision of this Court is based on an assumption by this Court that the awkward application of

the emergency brake must have been known by Mr. Mitchell before the accident and, therefore, could have been corrected by brake adjustment. This is an issue which was raised by the Court in its reported decision although *never* argued at trial or on appeal.

3. It was clearly the Plaintiffs' position at trial that Mr. Mitchell ". . . had used the parking brake during his use of the truck before the accident and *never had any particular diffiiculty under the circumstances in which he used it before the accident in June of 1973.*" R. 24, Plaintiffs' Opening Statement. (Emphasis supplied).

4. This Court failed to consider in ruling on the Petition for Rehearing the fact that the sudden stress emergency application of the emergency brake was the circumstance which made the awkward application of the brake a situation where "something suddenly went wrong."

5. In the ruling on the Petition for Rehearing this Court states that it was the Plaintiffs' trial and appellate position that the conditions were known by the driver. On the contrary, Mr. Mitchell testified that he didn't ". . . encounter any difficulty in using the brake prior to the accident." R. 284. *None* of the witnesses in this case testified that the dangerous conditions were obvious to Mr. Mitchell. Even Mr. Carroll, whose testimony was relied upon heavily by this Court in its reported decision, did not state that the conditions were obvious. Of course, Mr. Carroll does work for Ford (R. 158 and 159; See the NH case of *Alvin Greenland* v. *Ford Motor Company*, decided October 31, 1975, involving a verdict for Ford in which Mr. Carroll was the expert who testified for Ford) and the weight of his testimony should have been determined by the jury. This Court now says that the position that the brake wear conditions were seen by the driver "was substantially repeated in Plaintiffs' Brief on appeal."

This Court in its reported decision criticized the Plaintiffs for arguing in their Brief that the defect was not obvious, but now it is claimed in the order of April 26, 1976 that Plaintiffs' Brief admitted that the brake wear was perceptible. Plaintiffs' original pleadings stated:

> "On June 15, 1973, the Plaintiff, Ernest Mitchell, Jr., *who was unaware of said defects* . . . (R. 5) . . . The Defendant, Ford Motor, had *no reason to believe* that the Plaintiff, Ernest F. Mitchell, Jr. *or anyone in the position of the Plaintiff would realize the dangerous defects* and conditions of said truck." (R. 6) Emphasis supplied).

The Plaintiffs continuously maintained this position right through appeal to this Court. The mistake in the reporting of the Opening Statement should not, in fairness, be relied upon to claim the Plaintiffs took a position contrary to that actually taken.

6. This Court did not consider the constitutional issues raised in the Petition for Rehearing. Seventh and Fourteenth Amendments to the United States Constitution.

7. Any evidence quoted by this Court from the transcript to attempt to justify its view of the facts can be controverted by stronger evidence quoted by the Plaintiffs to justify their position. No matter how many facts can be viewed one way or another, there is one fact which cannot be denied, namely, that this Court has taken from Mr. and Mrs. Mitchell something that is rightfully theirs, the right to a jury trial, a right which the New Hampshire Constitution has declared to be "held sacred." Article 20, New Hampshire Constitution.

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 75-1176

ERNEST F. MITCHELL, JR., et al.,

PLAINTIFFS, APPELLEES,

v.

FORD MOTOR COMPANY,

DEFENDANT, APPELLANT.

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

MEMORANDUM AND ORDER ON
MOTION TO STRIKE, ETC.

Entered May 4, 1976

PER CURIAM. Without pausing to weigh the pros and cons, the Court is content to accept Plaintiff's statement, and to substitute plaintiff's phrase "and foreseen by the designer," for the transcript phrase "and seen by the driver." (Also to strike the phase "(Emphasis suppl.).")

This does not affect the result. The purpose of making this quote was to point out that Plaintiff's case was predicated on there having been wear, which changed the location of the lever vis-a-vis the seat. If the substitution is made, so as to say that the change should have been foreseen by the designer, it is still a claim that there was in fact a change—or there would have been nothing to foresee, or operative negligence.

We stand on the rest of our opinion and prior memoran-

dum. Plaintiff's claim that he was unconstitutionally deprived of a jury trial, taken at its face value, would mean that a verdict could never be directed.

Except as above, all motions are denied.